

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Mr Jose Antonio HERNANDEZ
Petitioner

CASE No _____

vs.

MONTEREY COUNTY

Mr JAMES E. TILTON
Respondent

No C 07-3778 MMC (PR)

PETITIONERS OPPOSITION TO
RESPONDENTS ANSWER TO ORDER TO
SHOW CAUSE

Mr Jose Antonio Hernandez
In Pro Per.



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VERIFICATION

I JOSE A HERNANDEZ, declare:

I am over the age of 18 and a Resident of Kern Valley State Prison located in Delano California. I am making this Verification on my own behalf.

I wrote the foregoing OPPOSITION TO RESPONDENTS ANSWER TO ORDER SHOW CAUSE. and know the contents thereof to be true to the best of my knowledge, information, or belief.

I declare under Penalty of perjury under the laws of the State of California that the foregoing is true and correct

Executed in Delano, California
on this 5th day of MARCH 2008

Respectfully Submitted

Jose A Hernandez
In Reo Per.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSE ANTONIO HERNANDEZ,

Petitioner

vs.

JAMES E. TELTON, Director
Department of Corrections,
Respondent

CASE No _____

No. C07-3778 MMC (PR)

PETITIONERS OPPOSITION TO
RESPONDENTS ANSWER TO
ORDER TO SHOW CAUSE

PLEASE TAKE NOTICE, On July 23, 2007.

Petitioner, A California Prisoner, Incarcerated at
North Kern State Prison, and Proceeding Pro
Se Filed the above-titled petition For
writ of Habeas Corpus pursuant to 28
U.S.C. § 2254.

On November 15, 2007, This Honorable
Court Issued an Order to Show Cause;
Granting leave to Proceed in Forma Pauperis.



1 On Feb 19, 2008. Petitioner received and
2 was Served respondents Answer to Order to
3 Show Cause.

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6 BACK GROUND

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8 In 2005, In the Superior Court of
9 Monterey County, Petitioner was Found
10 guilty of attempted Murder, Exhibiting a
11 deadly weapon to Resist Arrest, Assault on
12 a peace officer, and being a felon in
13 possession of a firearm. Petitioner was
14 Sentenced to the term of Forty - three
15 years to life in a State Prison. The
16 California Court of Appeal affirmed,
17 and the California Supreme Court Denied
18 the petition for review.

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21 STATEMENT OF FACTS

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23 In response to information that petitioner
24 was a parolee at large from Imperial County
25 and was in King City at 404 Vandervhurst. On
26 November 30, 2004, parole agents Terry
27 Davis, Bottorff, and Ben Jimenez decided

1 to go there and arrest him (RT 93-94, 161.) They
2 were dressed in plain clothes and were driving
3 a dirty 1997 Jeep Cherokee. (RT 98.) In
4 the way they stopped at the police station to
5 request assistance, but were told the officers
6 would not be available for another 20 minutes.
7 (RT 97-98.) The agents decided to drive by
8 the residence. (RT 99.)

9 As they passed near the residence, they
10 noticed petitioner standing outside a white
11 car speaking with the driver (RT 103-104.)
12 They decided to apprehend him. (RT 106.)

13 They got out of the Jeep and approached
14 him. Following a preconceived plan. Davis
15 told petitioner he was supposed to meet his
16 daughter and granddaughter at a school
17 or park in the area, and that he got lost
18 getting off the freeway. (RT 107.) Petitioner
19 walked up to them and started giving them
20 directions and pointing (RT 129.)

21 At that point, Agent Jimenez pulled
22 out petitioner's name, Jose, and Davis said,
23 "State Parole, you're under arrest." (RT 108-
24 109, 153, 189.) Davis tried to grab petit-
25 ioner's right arm, and Bottorff grabbed
26 his left arm, but petitioner spun away
27 and, according to Bottorff, said "you're



1 not taking me." Then he tried to Run away.
2 (RT 111, 190.) DAVIS grabbed him around the
3 waist, and the three of them went to the ground
4 on a grassy area by the Sidewalk. (RT 111-
5 112, 154.) Petitioner bounced Right back up to
6 a Standing position. (RT 132.) Davis grabbed
7 his left ankle and his belt, while, Jimenez
8 grabbed his neck, and they went to the
9 ground again. This time Jimenez was at
10 the bottom of the pile facing up, with Peti-
11 tioner directly on top of him facing down,
12 and Bottorff and DAVIS above them (RT 113-
13 115, 135, 154-155, 190-191.)

14 Bottorff still had a hold of petitioners
15 left arm. Petitioners right arm was underneath
16 his body. (RT 156-157.) Jimenez, Concerned that
17 petitioner would grab his weapon, yelled, "Spray
18 him." Bottorff Sprayed petitioner with pepper
19 Spray. When petitioner Continued to resist.
20 Bottorff Sprayed him a Second time. (RT 155,
21 192-193.) According to Jimenez, it is at this
22 point that petitioner said, "Fuck it, you
23 won't take me." (RT 193.) Then Jimenez Saw
24 petitioners right hand holding a Revolver
25 in shooting position. Jimenez yelled, "He's
26 got a gun." (RT 157-158, 193.) Petitioner
27 could have fired the gun at any time. (RT

205.) When Bottorff saw petitioner's right hand come out from under his body to the right, he pinned petitioner's arm to the ground, and hit it twice against the ground, causing the gun to be released from petitioner's hand. (RT 157-159.)

Jimenez had managed to extract himself from the pile and got up. (RT 195.) He saw the gun lying on the ground. (RT 205.) He remarked to Davis, "He pointed a gun at my head." (RT 116.) Bottorff handed the gun to Davis. (RT 117, 142, 159, 196.) Petitioner stopped resisting and the agents handcuffed him. (RT 159.) In a search of petitioner's person, a brown holster, black gloves, and a Sili Masil were found. (RT 119.) When officer John Peters arrived, he took custody of the gun. (RT 118.)

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ARGUMENT

I

THE LOWER STATE COURTS

DISPOSITION AS TO COUNT TWO CONVICTION/
SENTENCING VIOLATED PETITIONERS STATE
AND FEDERAL RIGHTS TO DUE PROCESS OF
LAW.

The state courts and respondents determination that the evidence of attempted murder was substantial cannot be supported. The conclusion that petitioner attempted to murder Jimenez when he repeatedly pointed the gun at his head has no support in the case law. As it is evident from the lower courts failure to cite any comparable case.

Convictions based on legally insufficient proof of guilt violate a criminal defendants state and federal rights to due process of law and to a fair trial, and reliable guilt and penalty determinations. U.S. Const., 5th, 6th, 8th & 14th Amendments; Cal. Const., art. I §§ 1, 7, 15, 16 & 17. Sullivan



1 V. LOUISIANA (1993) 500 U.S. 275, 278. "The
2 Due Process Clause protects the accused against
3 Conviction except proof beyond a Reasonable
4 Doubt of every fact necessary to constitute
5 the Crime with which he is charged."

6 Jackson v. Virginia 443 U.S. 307, 319. (1979)

7 Cases from other Jurisdictions
8 explicitly hold that pointing a gun at
9 Someone Cannot in and of itself Support
10 an Attempted Murder Conviction. In
11 Riebal v. State 106 Nev. 258. (1985) [790
12 P.2d 1004] The Defendant pointed a gun
13 at officers while fleeing from the Comm-
14 ission of a Robbery. The Supreme Court
15 Reversed. Stating: Although pointing a
16 gun goes beyond mere preparation [citation]
17 Merely pointing a gun is not Sufficient
18 to Convict for Attempted Murder". The
19 Court found that the State had not proved
20 its Case because it presented no evidence
21 that the defendant "acted overtly toward
22 Committing the Crime of Attempted Murder."
23 and no proof that he Attempted to fire
24 the gun.

25 As in this Case. Petitioner according
26 to the Transcripts of testimony Could
27 have fired the Gun at Any time (RT 205.)



Similarly, the Supreme Court of Ohio found insufficient evidence of attempted murder where the defendant, while running from pursuing officers, turned and aimed the gun on them. State v. Mills 62 Ohio St. 3d 357, 370 [582 N.E. 2d 972, 984]. In Brown v State (1985) 64 Md. App. 324, 330-332 [494 A.2d 999, 1002-1003]; The Appellate Court disapproved an instruction stating that "One may be guilty of assault with intent to murder by pointing a deadly weapon at a vital part of another persons body" after concluding that a finding of an intent to murder may not be based solely on pointing the weapon at an officer. A Louisiana appellate Court reversed an attempted murder conviction where the defendant held a gun to the victim's head and threatened to shoot him, and the shot into the victims van. The Court reasoned that the defendant had numerous opportunities to shoot the victim but did not, he held the gun to the victim's head, yet did not shoot or attempt to shoot him, and the victim, although shaken, remained unscathed. State v. Hawkins (La. Ct. App. 1994) 631 So.2d 1288, 1290; See also. People v. Okundaye



(1989) 189 Ill. App. 3d 601, 605 [545 N.E.2d 505, 509]; Meiritt v. Commonwealth (1935) 164 Va. 653, 663 [180 S.E. 395, 399-400].)

Like California, other jurisdictions require unambiguous conduct or statements by the defendant indicating an intent to kill in addition to evidence that the defendant pointed the weapon at the victim. For example, fatally shooting another person immediately before pointing a gun at the victim is conduct indicative of an intent to kill, or firing the gun in the air, and then the victim or even pointing the gun at the victim and repeatedly pulling the trigger.

Apart from repeatedly pointing a gun at Jimenez's head, Petitioner did not engage in any conduct or make any statements indicating he intended to kill Jimenez and not just assault him. Petitioner's conduct would have qualified him for a conviction of assault with a deadly weapon. People v. Miceli (2002) 104 Cal. App 4th 256, 269 [pointing a loaded gun in a threatening manner at another, especially if accompanied by threats to shoot, constitutes an assault].

However, an intent to murder cannot be inferred from the commission of the

Crime of assault with a deadly weapon, but must be affirmatively proved by direct evidence or by solid inference.

Petitioner's Statement, "You Won't take me," cannot and should not transform the assault into Attempted Murder. It did not either literally or indirectly indicate an intention to kill Jimenez. Whether petitioner made the statement at the start of the struggle, as Battorff testified, or before he extracted the gun from his pocket, as Jimenez stated, it only indicated only his intention to get away. Petitioner's conduct was consistent with this intent, and inconsistent with an intent to kill Jimenez. Petitioner tried to run, bounced back up the first time he was taken down, and he continued to struggle to get away until he was subdued. At the same time and most important petitioner passed up opportunities to shoot Jimenez.

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CONCLUSION

The Lower States Court determination and Ruling that the evidence of attempted murder was Substantial Cannot be Supported. It's Conclusion that petitioner attempted to Murder Jimenez when petitioner repeatedly pointed the gun at has no Support in the Case law, as is evident from the Court and Respondents failure to Cite any Comparable Case. (Op., 11-12)

Under the Federal Constitution, evidence is Sufficient to Support a State Conviction only if, "after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found essential elements of the Crime beyond a reasonable doubt." Jackson v. Virginia, Supra, 443 U.S. a p. 319.) What is required is "evidentiary Certainty

The evidence in this Case does not meet that Standard because the prosecution proved neither an intent to kill nor an attempt to do so. Accordingly, the absence of Sufficient evidence to Support petitioners Conviction of Attempted Murder on

1 parole agent Jimenez on Count 2 Violated
2 petitioner's Federal and State Constitutional
3 Rights

4 Accordingly, Petitioner respectfully
5 asks this Honorable Court to grant
6 writ of Habeas Corpus.

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15 Respectfully Submitted

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18 Jose A. Hernandez

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21 In Pro Per

22
23
24 Dated: March 5th 2008



ORDER TO SHOW
CAUSE

No. C07-3778 MMC (PR)

Nov. 15, 2008



FILED

NOV 15 2007

**RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

#5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSE ANTONIO HERNANDEZ,

Petitioner,

v.

JAMES E. TILTON, Director,
Department of Corrections,

Respondent.

No. C 07-3778 MMC (PR)

**ORDER TO SHOW CAUSE;
GRANTING LEAVE TO PROCEED
IN FORMA PAUPERIS**

(Docket Nos. 2 & 4)

On July 23, 2007, petitioner, a California prisoner incarcerated at North Kern State Prison and proceeding pro se, filed the above-titled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner seeks leave to proceed in forma pauperis.

BACKGROUND

In 2005, in the Superior Court of Monterey County, petitioner was found guilty of attempted murder, exhibiting a deadly weapon to resist arrest, assault on a peace officer, and being a felon in possession of a firearm. He was sentenced to a term of forty-three years to life in state prison. The California Court of Appeal affirmed, and the California Supreme Court denied the petition for review. Petitioner did not seek state habeas corpus relief.

DISCUSSION

This Court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975). A district court shall "award the writ or issue an

order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.” 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in the petition are vague or conclusory, palpably incredible, or patently frivolous or false. See Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990) (quoting Blackledge v. Allison, 431 U.S. 63, 75-76 (1977)).

Petitioner claims his conviction for attempted murder was based on insufficient evidence, in violation of due process. Liberally construed, petitioner’s claim is cognizable.

CONCLUSION

For the reasons stated above, the Court orders as follows:

1. The Clerk of the Court shall serve by certified mail a copy of this order and the petition, along with all attachments thereto, upon respondent and respondent’s attorney, the Attorney General for the State of California.¹ The Clerk shall also serve a copy of this order on petitioner.

2. Respondent shall file with the Court and serve on petitioner, within **ninety (90)** days of the date this order is filed, an answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted based on petitioner’s cognizable claims. Respondent shall file with the answer and serve on petitioner a copy of all portions of the state trial record that have been transcribed previously and that are relevant to a determination of the issues presented by the petition.

¹Petitioner has named as respondent James E. Tilton, Director of the California Department of Corrections. The rules governing relief under 28 U.S.C. § 2254 require a person in custody pursuant to the judgment of a state court to name the “state officer having custody” of him as the respondent. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (quoting Rule 2(a) of the Rules Governing Habeas Corpus Cases Under Section § 2254). While the warden of the institution in which the petitioner is incarcerated is the typical respondent, the “state officer having custody” also may include “the chief officer in charge of state penal institutions.” Id. (quoting Rule 2(a) advisory committee’s note). In California, the Director of Corrections may be named as the respondent, without destroying the federal court’s personal jurisdiction over the petition. See id. at 895, 96.

1 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with
2 the Court and serving it on respondent within **thirty (30)** days of the date the answer is filed.

3 3. In lieu of an answer, respondent may file, within **ninety (90)** days of the date this
4 order is filed, a motion to dismiss on procedural grounds, as set forth in the Advisory
5 Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases. If respondent files
6 such a motion, petitioner shall file with the Court and serve on respondent an opposition or
7 statement of non-opposition within **thirty (30)** days of the date the motion is filed, and
8 respondent shall file with the Court and serve on petitioner a reply within **fifteen (15)** days of
9 the date any opposition is filed.

10 4. Petitioner is reminded that all communications with the Court must be served on
11 respondent by mailing a true copy of the document to respondent's counsel.

12 5. It is petitioner's responsibility to prosecute this case. Petitioner must keep the
13 Court and respondent informed of any change of address and must comply with the Court's
14 orders in a timely fashion. Failure to do so may result in the dismissal of this action for
15 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).


16 6. Upon a showing of good cause, requests for a reasonable extension of time will be
17 granted as long as they are filed on or before the deadline they seek to extend.

18 7. In light of petitioner's lack of funds, the application to proceed in forma pauperis is
19 hereby GRANTED.

20 This order terminates Docket Nos. 2 and 4.

21 IT IS SO ORDERED.

22 DATED: **NOV 15 2007**

23 
MAXINE M. CHESNEY
24 United States District Judge
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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JOSE ANTONIO HERNANDEZ,
Plaintiff,

Case Number: CV07-03778 MMC

CERTIFICATE OF SERVICE

v.

JAMES E. TILTON et al,
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on November 15, 2007, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Jose Antonio Hernandez
North Kern State Prison
K-55991
P.O. Box 5104
Delano, CA 93216

Dated: November 15, 2007

Richard W. Wieking, Clerk



By: Tracy Lucero, Deputy Clerk

DECLARATION OF SERVICE BY MAILRe: Mr Jose Antonio Hernandez

I, Mr Jose Antonio Hernandez, reside in the County of Delano, California, I am over the age of 18.

I Served a Copy of the attached Document OPPOSITION TO RESPONDENTS ANSWER TO ORDER TO SHOW CAUSE, on all parties in this Action by placing a true copy thereof in an envelope addressed as follows:

<u>Office of the Clerk, U.S.D.C</u>	<u>Office of the Attorney General</u>
<u>Northern District of California</u>	<u>455 Golden Gate Ave Suite 11000</u>
<u>280 South First Street Room 2112</u>	<u>San Francisco, California</u>
<u>San Jose, Ca 95113-3095</u>	<u>94102-3664</u>

Each envelope was then sealed, fully pre-paid postage was affixed, and each envelope was deposited in the United States Mail at Delano, CA on March 5th, 2008.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 5th, 2008

Respectfully Submitted:

Jose A Hernandez
In Pro Per

Box
Delano,



Office of the Clerk U.S. I
Northern District of California
280 South First Street Room
SAN JOSE CA
95113-30